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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No. 470

ILLINOIS COMMERCE COMMISSION, et al.,
Petitioners,

vs.

GREAT LAKES ELEVATOR CORPORATION, et al.,
Respondents.

BRIEF FILED ON BEHALF OF THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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OPINION BELOW.

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 156 Fed. (2d), page 33.

PRELIMINARY STATEMENT.

The Railroad Commission of the State of California, on whose behalf this *amicus curiae* brief is offered to be filed,

is an agency of the State Government of the State of California, existing under and by virtue of the provisions of the Constitution and laws of said State, and having jurisdiction over all public utilities, including warehouses and warehousemen, operating within said State.

STATEMENT OF THE CASE.

The respondents are engaged in the business of the public storage of grain for hire at Chicago, Illinois. Most of the grain stored by respondents is received from, or shipped to, states other than Illinois. (R. 59-77.) Respondents conduct their respective warehousing businesses under authority of licenses issued by the Secretary of Agriculture of the United States hereinafter called the Secretary, pursuant to the United States Warehouse Act,[1] and under a schedule of rates, charges and practices duly filed with the Secretary, as required by the Federal act.

Daniel F. Rice & Company (hereinafter called Rice), an Illinois partnership, is an owner, shipper and dealer in grain in the State of Illinois, and is, and for some years past has been, a customer of respondent warehousemen, storing grain in the elevators maintained by respondents and paying grain storage and warehousing charges thereon.

On July 28, 1944, Rice filed with the Commission a complaint against the respondents in this case, and the respondent (Board of Trade of the City of Chicago) in No. 471, October Term, 1946, alleging violations of the

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[1]Tit. 7 U.S.C. 241-73.

Public Utility Act and the Illinois Grain Warehouse Act of the State of Illinois. In paragraph 13 of the Rice complaint it is charged that all or some of the respondents have violated the laws of the State of Illinois in the following particulars: charging unjust, unreasonable, and discriminatory rates; pursuing discriminatory practices; operating without a State license; failing to secure Commission approval of contracts and security issues; mixing public grain with grain of different grades; failing to file, print and publish schedules of rates and charges; and abandoning service without Commission approval. (R. 21.)

On August 30, 1944, respondents filed with the Commission their joint motion to dismiss (a) the complaint in its entirety, or (b) in the alternative, each of the separate charging paragraphs of the complaint. The stated grounds for the motion were that the subject matter of the complaint was beyond the jurisdiction of the Commission, and was exclusively within the jurisdiction of the Government of the United States by reason of paragraph 3, Section 8 of Article I of the Constitution of the United States, and of the United States Warehouse Act, and the Commodity Exchange Act,[2] and of the official regulations duly promulgated thereunder. (R. 25.)

On October 10, 1944, the Commission entered its order denying all motions of respondents to dismiss the Rice complaint and setting the cause for hearing before it on October 24, 1944. (R. 27.) The respondents in this case and in No. 471, thereupon filed in the District Court of

[2]Tit. 7 U.S.C. 1, et seq.

the United States for the Northern District of Illinois, Eastern Division, separate complaints for the purpose of enjoining Rice from the further prosecution of its proceeding before the Commission; of enjoining the Commission from entertaining further jurisdiction in the matter; and the Attorney General of the State of Illinois from instituting any proceeding against respondents for the purpose of enforcing any order of the Commission in the Rice proceeding. (R. 3-15.)

The defendants named in the respondents' complaint filed answers and motions to strike the complaint and dismiss the cause. (R. 36, 40, 43.) The two causes were consolidated for hearing in the trial Court and, on June 26, 1945, that Court entered a single order, dismissing both causes of action. (R. 91.) Upon separate appeals to the Seventh Circuit Court of Appeals, the order of the trial Court was reversed. (R. 126.) The Commission and the Attorney General of the State of Illinois, and Rice have filed here their petitions for writ of certiorari to review the decision of the Seventh Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT.

(1) This case is important, not alone to the parties named in the caption, but to warehousemen, grain dealers, farmers, states, and the public generally, all of whom are necessarily affected by the precedent which the judgment below creates. The history and development of all present-day public utility regulation stems from the early undertaking of the states to regulate warehouses and ware-

housemen. Since the landmark case of *Munn v. Illinois*, 94 U. S. 113, decided in 1877, warehousing has traditionally been a field for state regulation. The effect of the decision of the Court below, if permitted to stand, is to strip from the states this historic and important regulatory function as to every warehouseman who has obtained a license from the Secretary of Agriculture. Such a far-reaching decision, so destructive of long exercised state jurisdiction, ought not to become operative without the sanction of this Court.

(2) The Court below held that state regulation of Federally licensed warehousemen had been superseded in every respect. Yet the Federal act does not authorize the Secretary of Agriculture, among other things, to (a) fix or establish just and reasonable rates and charges; (b) prevent discriminatory rates and practices; (c) prevent the abandonment of warehousing service and capacity; or (d) approve or disapprove financial transactions or the issuance of securities. The effect of the decision of the Court below is therefore to create an hiatus in regulation relieving warehousemen, who secure Federal licenses, from important phases of regulation which are essential to protect the public interest. Unless and until this Court finds that the Congress intended to create such a vacuum in the regulation of warehouses, this undesirable result of the decision of the Court below ought not to become effective.

(3) The trial Court held that "there is no direct conflict between a licensing system to protect against fraudulent warehouse receipts, and utility regulation to pre-

serve the service in the public interest and it does not clearly appear that the state law has been completely superseded as to all of the matters covered by the complaint." (R. 90.) The Circuit Court rejected this view, holding that state regulation had been wholly superseded. It is open to grave doubt whether the view of the law expressed by the Circuit Court will be adopted by this Court—a doubt which will almost surely produce further litigation in other states unless put to rest in this case by this Court.

(4) These questions are questions of substance and general importance relating to the construction of the Constitution and Federal statutes. They have not been, but should be, settled by this Court. The misconstruction which the Court below has placed upon the pertinent Federal statutes should be corrected now by a decision of this Court, so that the Illinois Commerce Commission and other state commissions vested with authority under state statutes, to regulate warehousing, may proceed with their official duties within such jurisdictional bounds as this Court may prescribe; so that further unnecessary litigation may be avoided; so that warehousemen may know what will be the legal consequences of their acts; and so that the states may be left undisturbed in the exercise of their proper powers, which the Congress designed to preserve.

THE QUESTION PRESENTED.

The petition for certiorari and brief in support thereof, filed by the Attorney General of Illinois and the Illinois Commission, present a number of procedural questions of great importance. This *amicus curiae* concurs fully in the views of the petitioners on these procedural questions and believes that they are determinative of this case and call for a reversal of the judgment. However, the far-reaching precedent created by the decision of the Court below, which gives paramount concern to this *amicus curiae*, relates to the decision of that Court on the merits of the controversy. Accordingly, this brief will deal solely with the question on the merits, which may be stated as follows:

> Has the Federal Government, by legislation, so occupied and preempted the field of regulation of grain warehousemen as to deprive the Commission of authority to grant the relief and therefore regulate in the manner prayed for by Rice?

ARGUMENT.

I.

CLAIM OF SUPERSEDURE OF STATE AUTHORITY BY UNITED STATES WAREHOUSE ACT.

The question under this heading has been so thoroughly covered by the brief of the Attorney General of Illinois on behalf of the petitioners and the *amicus curiae* brief of the National Association of Railroad and Utilities Commissioners in support of the petition for the writ of certiorari herein that this particular phase of the case will not be argued in this brief. However, we adopt here

the argument and points advanced in the two said briefs referred to and by such reference incorporate the same in this brief.

II.

CONSTRUCTION OF SAID ACT.

Preliminarily, it is here pointed out that the United States Warehouse Act is an aggravated example of an attempted encroachment of Federal power upon state jurisdiction through indirection.

The fact that this Act is *permissive* does not change in any way the constitutional rules applicable to Federal vis-a-vis state power. Bearing in mind the ancient principle that the United States has only such powers as are conferred upon it by the explicit terms of the Federal Constitution and the necessarily implied powers flowing therefrom, it must be agreed that the only authority which the Federal Government may exercise over warehouses necessarily must stem from the commerce clause of that Constitution. If the Constitution does not confer the power, it cannot be supplied by consent of the owner of a warehouse. Jurisdiction over the subject matter may not be conferred by consent of the parties. Were this not so, this would be a government subject to no precise delimitation because its powers could constantly be augmented from time to time by the changing desires of individuals under permissive legislation, such as the Act considered. This Act gains no additional validity nor expansion of breadth of power because of its permissive nature. True

it is that the Act has no operative effect until the warehouseman has consented to its application to him by applying for and receiving a license but the power to accept the consent, if it exists at all, must exist *anterior* to the giving of the consent. Such consent confers no power that did not exist before such consent was given. The foregoing principles are elementary.

Section 2 of said Act (7 U.S.C. 242) provides as follows:

> "The term 'warehouse' as used in this chapter shall be deemed to mean every building, structure, or other protected inclosure in which any agricultural product is or may be stored for interstate or foreign commerce, or, if located within any place under the exclusive jurisdiction of the United States, in which any agricultural product is or may be stored. As used in this chapter, 'person' includes a corporation or partnership or two or more persons having a joint or common interest; 'warehouseman' means a person lawfully engaged in the business of storing agricultural products; and 'receipt' means a warehouse receipt."

From the foregoing quoted section, it is seen that if *any* agricultural produce *is or may be* stored for interstate or foreign commerce in a warehouse located within one of the several states, the owner thereof may, under the literal provisions of this Act, qualify for a license thereunder. There is nothing in this Act that sets up any standard to be followed by the Secretary of Agriculture in granting licenses other than the standard set out in Section 2 of said Act, so far as intrastate commerce as contrasted with interstate or foreign commence is con-

cerned. There is no finding in said Act or any provision thereof which declares that agricultural products stored for *intrastate commerce* must or should be regulated by the Federal Government in order to protect its admitted power to regulate the storage of agricultural products stored for interstate or foreign commerce. This Act is silent on the two subjects immediately adverted to. Therefore, the Secretary of Agriculture is invested with unlimited discretion as to the licensing of warehouses *if any agricultural product is or may be stored for interstate or foreign commerce in a warehouse located within a State.* Under the literal wording of this Act—and the Secretary of Agriculture is not at liberty to sit in judgment upon the constitutionality of said Act but must administer it according to its terms, the validity or invalidity of said Act being a matter exclusively for the courts—, the Secretary of Agriculture may license a warehouse located within one of the states if only one sack of wheat is stored therein or may be stored therein for interstate or foreign commerce, even though there may be stored in such warehouse at the same time two hundred tons of wheat for intrastate commerce. Bear in mind, this Act says nothing about it being necessary for a warehouse, in order to secure a Federal license, to have a substantial amount of agricultural products stored therein for interstate or foreign commerce or that a majority of the commodities stored therein be agricultural products stored for interstate or foreign commerce, or that any particular portion of the commodities generally stored in said warehouse be agricultural products stored therein for interstate or foreign commerce. So we see that these vital matters by which it may

be determined whether state or Federal jurisdiction lawfully should apply are not mentioned in this Act but that all such matters are left to the unlimited discretion of the Secretary of Agriculture in determining whether or not he shall grant a license to a warehouseman under this Act.

There is no definition contained in the Act defining or explaining the meaning or the limitation to be applied to the phrase "stored for interstate or foreign commerce." The Secretary is left free to speculate and conjecture as to the meaning of said phrase and to put his own interpretation thereon. And this is the heart and soul of the Act, so far as delimitation of Federal and State authority is concerned. This failure of definition constitutes an uncertainty and indefiniteness, which grossly offend constitutional rules applicable to delegation of power by the Congress to the Executive.

It is true that in several sections of this Act the expression "agricultural products" is used without any qualification as to whether such products are stored in a warehouse for interstate or foreign commerce or for intrastate commerce. It might thus be argued that these facts indicate an intention to include agricultural products stored for intrastate commerce within the sweep of the authority of this act. But, as has heretofore been pointed out, no standard or formula has been set up in this Act whereby the Secretary of Agriculture may determine whether he may lawfully issue a license to a warehouseman. We make the point that this Act is either invalid for uncertainty resulting from a legislative fail-

ure to set up a valid and proper standard or formula by which the Secretary of Agriculture may be guided in administering this Act, or it must be held that this Act confers authority only to license warehouses engaged primarily in the storing of agricultural products for interstate or foreign commerce, where such warehouses are located within one of the several states.

It is believed that this is a question of such importance that this Court should grant certiorari and, upon the record herein, give a binding interpretation of this Act for the guidance of the Secretary, the several states and the industry involved. As the matter now stands, there is a grave uncertainty as to just how much authority is granted to the Secretary of Agriculture under this Act. By following the literal wording of the Act, the Secretary of Agriculture could assume to grant a Federal license covering a warehouse located within a State even though an infinitesimal part of the commodities stored therein may be agricultural products stored for interstate or foreign commerce. Having granted the Federal license, the Secretary of Agriculture, by virtue of the provisions of Section 29 of said Act (7 U.S.C. 269), could claim that he had exclusive jurisdiction over said warehouse notwithstanding the fact that ninty-nine percent of the commodities stored therein may be commodities that have nothing to do whatsoever with or affect in any way interstate or foreign commeree. *It is the Federal license that is the criterion*, not commodities that may be stored for interstate or foreign commerce. Here we have the aggravated example of attempted encroachment upon State authority by the Federal power through indirection.

First, the Act provides that a Federal license may be granted if any agricultural product is or may be stored in a warehouse for interstate or foreign commerce and, second, *after such license has been granted,* then all these other alleged powers purportedly granted by this Act to the Secretary of Agriculture follow ineluctably from the provisions thereof.

This Court has established, by a long line of decisions, the rule that Federal encroachment upon State power is not to be lightly assumed and that before this Court will hold that state power has been superseded by Federal authority, the Act of the Congress purporting to supersede state power must be clear and unambiguous and the attempt to so supersede must be plainly expressed and furthermore that the repugnance between the two jurisdictions must be irreconcilable.

Palmer v. Massachusetts, 308 U. S. 79, 85, 84 L. ed. 93, 98;

Kelly v. Washington, 302 U. S. 1, 9 to 10, 82 L. ed. 3, 10;

Simpson v. Shepard, 230 U. S. 352, 402, 57 L. ed. 1511, 1542.

While it is true that this Court in the case of *United States v. Hastings,* 296 U. S. 188, held that an indictment for the stealing of agricultural products from a Federally licensed warehouse must contain an allegation that the products stolen were stored in such warehouse for interstate or foreign commerce, the holding in that case did not purport to be a complete construction of said Act. It was pointed out by this Court in that case that the record

therein was not sufficient to justify a more elaborate construction of the Act. The question therein decided was narrowly confined to Section 30 of the Act (7 U.S.C. 270), which provides for punishment for the violation of certain provisions of said Act, and also Section 17 of said Act (7 U.S.C. 259) authorizing and requiring the issuance by a warehouseman of warehouse receipts covering agricultural products stored in a warehouse for interstate or foreign commerce. Therefore, it is of the first importance that this Court give a binding interpretation of this Act so that the Federal authority on the one hand and the state authorities on the other hand may have a proper guide whereby they may lawfully exercise their proper jurisdiction in this important field of commerce and trade. Of course, it can be contended and it has been contended that in a situation of the nature herein described the Federal authority should sweep before it all state authority because of the paramount necessity for uniformity. This Court has not subscribed to that doctrine and very definitely said so in the case of *Davies Warehouse Company v. Bowles*, 321 U. S. 144. It was there pointed out by Mr. Justice Jackson in the prevailing opinion in that case that the very nature of our dual sovereignty would not lend itself to uniformity or to excessive efficiency. It was pointed out in that case that the accommodation which the central authority must accord to the jurisdiction of the states necessarily involved a procedure that might not be as efficient as though all jurisdiction were wielded by the central government.

The Circuit Court of Appeals in its decision in this case made the following observation:

"Evidently the Act in its relation to warehouses is *limited to interstate commerce*, and the *Secretary's jurisdiction is confined to that field.*" (Emphasis supplied.) (156 Fed. (2d) 39.)

This statement in the Court's opinion in this case is more of an observation than a direct holding and in light of the fact that the opinion therein raises the question of the breadth of the Secretary's jurisdiction, it seems most appropriate that this Court should grant certiorari for the purpose of settling this question once and for all. When we read the decision of the Supreme Court of South Dakota (*In re Farmers Coop. Assn.*, 8 N. W. (2d) 557), cited and relied upon by the Court below, construing this Act to a point of absurdity, one may well understand the crying necessity for this Court to grant certiorari in this case.

CONCLUSION.

Based upon the foregoing argument and authorities, we respectfully urge upon this Court that it grant certiorari in this case for the purpose of clarifying the uncertain, contradictory and ambiguous provisions of the Act in question herein. If this Act is valid in its entirety and has wholly superseded state jurisdiction wherever a warehouse has been licensed by the Secretary of Agriculture, it is most important to the Federal Government, the several state governments and the industry concerned that that fact be declared by this Court. If, on the other hand, this Act is invalid in whole or in part because of its uncertain and ambiguous provisions and because of the fact that no

definite standard or formula has been set up therein to guide the Secretary of Agriculture in administering said Act, then, it is most important to the parties heretofore mentioned that this fact be declared. And we may here observe that this Court is the only tribunal that can make these final and binding declarations.

Therefore, it is prayed that this Court accept for filing this brief and that the petition for writ of certiorari herein be granted and that this Court render its decision comprehensively interpreting and construing this Act to the end that all interested parties may know just exactly what jurisdiction is conferred upon the Federal Government by the provisions thereof.

Dated, San Francisco, California,
October 4, 1946.

Respectfully submitted,

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